

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-1499

To be argued by
STEPHEN GILLERS

In The
United States Court of Appeals
For The Second Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

-against-

JOSE ANTONIO MANZUETA,
Defendant-Appellant.

*Appeal from the United States District Court for the Southern
District of New York*

REPLY BRIEF FOR DEFENDANT-APPELLANT

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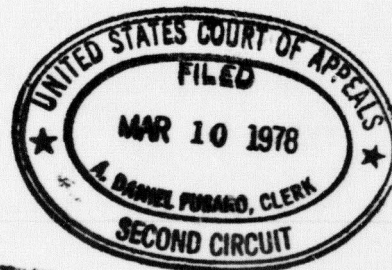


TABLE OF CONTENTS

	Page
TABLE OF CASES	i
PRELIMINARY STATEMENT	1
POINT I - THE DEFENDANT DID NOT WAIVE HIS RIGHT TO COUNSEL	1
POINT II - THE McNABB-MALLORY POINT WAS PRESERVED	3
POINT III - THE ERRORS WERE NOT HARMLESS BEYOND A REASONABLE DOUBT	5
CONCLUSION	5

TABLE OF CASES

<u>U.S. v. Pheaster</u>	
544 F. 2d 353, 364-65, 367-68 (9th Cir. 1976)	2
<u>U.S. v. Kinsman</u>	
540 F. 2d 1017 (9th Cir. 1976)	2
<u>U.S. v. Womack</u>	
542 F. 2d 1047, 1050 (9th Cir. 1976)	2
<u>Miranda v. Arizona</u>	
384 U.S. 436, 474 (1966)	2
<u>U.S. v. Grant</u>	
549 F. 2d 942 (4th Cir. 1977)	3
<u>U.S. ex rel. Burgos v. Follette</u>	
448 F. 2d 130 (2nd Cir. 1971)	5

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PRELIMINARY STATEMENT

This reply brief is submitted in response to the Government's brief. It reviews the major points of contention on appeal where these might not already be clearly defined by the main briefs of the parties.

POINT I

THE DEFENDANT DID NOT WAIVE HIS
RIGHT TO COUNSEL

In his main brief, Manzueta argued that it was error to admit in evidence against him any statement made to the Assistant United States Attorney during the "pre-arraignment detour" where the statement was made after Manzueta had been offered counsel and had accepted the offer. See pp. 11-13, brief for Defendant-Appellant.

The Government argues that, by answering additional questions after his request for an attorney, Manzueta waived that request. See pp. 21-23, Government's brief.

The Government's cases are not in point. U.S. v. Pheaster, 544 F. 2d 353, 364-65, 367-68 (9th Cir. 1976), involved statements made by the accused on the way to the magistrate, in response to a government agent's recitation of the evidence against him, not in response to questions. More directly in point is the Ninth Circuit's decision in U.S. v. Kinsman, 540 F.2d 1017 (9th Cir. 1976). In Kinsman, the defendant was brought to the police station and asked to see his attorney. The authorities refused because they believed the attorney was "an illegal conduit of messages." Kinsman was questioned and confessed. The court affirmed a decision suppressing the confession, stating: "The key principal is that once a defendant asks for the presence of counsel, the questioning must stop." See also U.S. v. Womack, 542 F. 2d 1047, 1050 (9th Cir. 1976).

In Michigan v. Mosley, 423 U.S. 96, 104 n. 10 (1975), the Supreme Court reiterated that there was a distinction between the assertion of the right to remain silent "and a request for an attorney." The Mosley court, quoting from Miranda v. Arizona, 384 U.S. 436, 474 (1966), stressed that when there is a "request for an attorney," the "interrogation must cease until an attorney is present."

The other cases cited by the Government at pages 21-22 of its brief, for the broad proposition that questioning of a

suspect is not per se barred after an assertion of the right to counsel, involved facts different from those here. For example, U.S. v. Grant, 549 F. 2d 942 (4th Cir. 1977), involved a spontaneous declaration by the accused.

The Court must be aware of the obvious power imbalances present after arrest, imbalances that defense counsel is constitutionally expected to correct. Here these imbalances are complicated further by the fact that defendant had already been incarcerated for two days and that his interrogator was a trained lawyer. To find a "waiver" here would be to protect only those defendants with the strength actually to do verbal battle with the government lawyer by repeating for yet a second time their insistence on the proffered counsel despite the government lawyer's wish to forge ahead and question the uncounseled accused. What magic words does the accused have to utter in order to establish the fact that he "really" means it? Isn't it clear that most people in an accused situation, even assuming they have the temerity to accept the offer of counsel at the outset, will hesitate to challenge their questioner a second time (especially if the questioner is a government lawyer) if he presses them to abandon their request for counsel?

POINT II

THE McNABB-MALLORY POINT WAS PRESERVED

The Government argues that defendant's McNabb-Mallory

contention (pp. 13-15 of defendant's brief) can not be made because it was "waived" below.

The McNabb-Mallory argument concerns statements made to agent Simon on a "pre-arraignment side trip" the purpose of which was to get a confession.*

Manzueta's appointed counsel challenged statements made to agent Simon in the following language:

THE COURT: What you are moving to suppress are any statements or testimony by agent Simon as to what the defendant told him on July 7, 1975 in the interview which agent Simon conducted. You are moving to suppress anything the defendant told him at that interview.

MR. FIGUEROA: Yes.

THE COURT: That's clear. (pp. 81-82).

It is true that later on only the Miranda basis for suppression was argued, but that could hardly be taken to mean that counsel intended to waive every other possible basis and this Court should

* The Government argues that the purpose of this "side trip" was "routine processing of an arrested suspect." (p. 28, Government's brief). There is no support cited for this bald assertion. In fact, the only thing that happened on this "side trip" is the effort to get a confession before the accused would be taken to the magistrate, at which time his right to counsel would attach.

not so lightly infer a waiver. U.S. ex rel. Burgos v. Follette,
448 F. 2d 130 (2nd Cir. 1971).

POINT III

THE ERRORS WERE NOT HARMLESS BEYOND
A REASONABLE DOUBT.

The single major issue in this case was Manzueta's knowledge that the bills were counterfeit. The only evidence of consciousness of guilt, other than the statements defendant claims were improperly admitted, consists of statements made to the proprietor of the liquor store at which the counterfeit bills were allegedly passed. These statements -- that defendant obtained the bills from a "numbers man" and that the defendant offered "\$200 to leave the store" -- are arguably inculpatory but not so clearly inconsistent with innocence. Proof of guilt was substantially aided -- as the government's lawyer recognized in his summation -- by (1) the false exculpatory statements defendant twice made thereafter and (2) the "pedigree" information elicited after an assertion of the right to counsel and tending to prove that Manzueta would know counterfeit money.

CONCLUSION

The conviction should be reversed for a new trial.

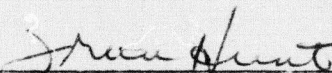
Respectfully submitted,

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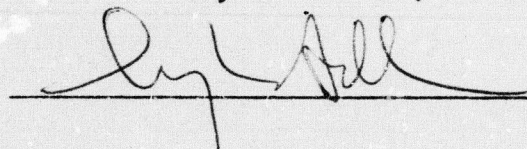
STATE OF NEW YORK)
) SS:
COUNTY OF NEW YORK)

Fran Hunt, being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at New York, New York; on March 9, 1978 deponent served the within Reply Brief of Defendant-Appellant upon the United States Attorney's Office, attorneys for Plaintiff-Appellee herein, at One St. Andrews Plaza, New York, New York 10007, the address designated by said attorney for that purpose, by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.



Fran Hunt

Sworn to before me
this 9th day of March, 1978.



STEPHEN GILLERS
Notary Public, State of New York
No. 61-4007113
Qualified in New York County
Commission Expires March 30, 1979